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ABSTRACT

Because of judicial indifference and legislative inaction, the conflict between the right of privacy and the freedom of the press is no closer to a resolution than it was a century ago. William Prosser's reduction of the common law of privacy into four separate torts has not solved the problem. The concept of "newsworthiness" has not been helpful either because the judiciary has neither advanced nor adopted a unified theory of the news. Efforts to link privacy to community mores have been misdirected, stressing the community's right to shield itself from indecency instead of the individual's autonomy and dignity, and failing to discriminate between various types of privacy. Privacy should be treated as a value worthy of its own status, as a matter of human dignity and a requisite for a democratic society. Since prior restraint would be too destructive to freedom of the press, the goal of privacy law must be to prevent its further abuse. A four-part test can be used to balance the plaintiff's and defendant's responsibilities in a privacy action. The plaintiff must show that the disclosed facts are truly private and that their publication was sufficiently embarrassing to result in a loss of dignity; the defendant must explain why disclosure was "in the public interest" and thus privileged and why it was necessary to reveal the plaintiff's identity. (JL)

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THE PRESS, PRIVACY, AND COMMUNITY MORES

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THE PRESS, PRIVACY AND COMMUNITY MORES

The conflict between the right of privacy and freedom of the press is no closer to resolution today than it was nearly a century ago when Samuel Warren and Louis Brandeis complained that when the press allows gossip to attain the "dignity of print," it oversteps the "obvious bounds of propriety and of decency."[1] Not only does it remain unresolved, but given a variety of technological advances in both the gathering of information and its public dissemination, the conflict today is decidedly more pervasive and probably more unsettling than it was in 1890. Although the common law of privacy has received an unprecedented "outpouring of comment in advocacy of its existence,"[2] the right of privacy continues to suffer from judicial indifference and legislative inaction.

While most states recognize the common law of privacy, only a handful have codified privacy protection in the form of statutory law.[3] Where statutory protection exists, however, it ordinarily extends only to an individual's publicity rights.[4] Consequently, in the absence of any concerted effort by state legislatures to establish a sufficiently broad and uniform privacy statute, an individual's privacy claims against an intrusive press are generally based on the traditions of common law.

Regrettably, the common law of privacy itself represents a vague and often confusing understanding of the concept of privacy, and more often than not it too fails to accommodate an individual's interest in preventing the publication of true but embarrassisng facts. Due presumably to judicial timidity and a reluctance to impose qualifications on the Supreme Court's construction of a "robust and uninhibited press,"[5] the courts have exhibited little appreciation for the moral and legal tension created by an individual's desire to conceal private facts and a journalist's proclivity to disclose them. Indeed, the privacy tort has metamorphosed into something less coherent and less distinct

than the privacy claim to which Warren and Brandeis addressed themselves in their Harvard Law Review essay; it now covers a variety of interests wholly unrelated to what Warren and Brandeis described as the principle of the "inviolate personality." Ironically, the law of privacy is today least effective in its dealings with the very controversy that served as the impetus for the Warren and Brandeis article: journalism's invasion of "the precincts of private and domestic life."[6]

Whereas Warren and Brandeis sought protection for a broad right "to be let alone,"[7] in 1960 William Prosser[8] reformulated privacy into four separate torts: (i) intrusion upon an individual's seclusion or solitude,[9] (ii) appropriation of an individual's name or likeness,[10] (iii) public disclosure of embarrassing facts,[11] and (iv) publicity which places an individual in a "false light."[12] Notwithstanding efforts to recast privacy as a single tort,[13] Prosser's typology prevails; as an established legal tradition rooted in an analysis of hundreds of cases, Prosser's four privacy categories constitute a convenient definition of the scope of legal protection for privacy: "by reducing decisions to a small number of principles of liability, lawyers and judges are able to rely on legal tradition without having to consult all the cases anew each time a privacy claim is made."[14]

As practical as Prosser's typology may be, however, it contributes little to a theory of privacy; for as Gavison reminds us, there "is no guarantee that the concepts arising from adjudication will be coherent."[15] To be sure, Prosser's approach to privacy is essentially that of a reductionist. With no external or extra-legal conceptualization of privacy, actionable privacy claims tend to be reduced to other interests; and when the only interests taken into account are those to which privacy is reducible -- when the result is simply "to put old claims in new terms" -- privacy "is made redundant despite its usage."[16] To wit: Prosser's intrusion tort can be dealt with by trespass or

nuisance laws; the appropriation tort is a matter of property rights and can be thought of as a trademark or copyright violation; and the "false light" tort concerns reputation and can be accommodated under the law of defamation.

Significantly, only the public disclosure tort stands on its own as a privacy claim not readily reducible to other interests. For this reason it has been called the "pure" or "true" privacy tort,[17] a status it retains even if it remains the one tort in Prosser's quartet least understood by the judiciary.

The public disclosure tort -- what Kalven appropriately calls the "mass communication tort of privacy" -- is the least understood and the most problematic of Prosser's four torts in the sense that it appears to have no legal profile: "we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions and even strict liability."[18] Rather than explicating the questions and issues relevant to a prima facie case, the courts have chosen to link public disclosure claims to a community's standards of decency: only if the disclosure functions "to outrage the community's notion of decency"[19] would the disclosure qualify as a tortious invasion of privacy. Thus what emerges as the basis for an actionable privacy claim is an inexplicable connection between the unauthorized disclosure and "the right of the community to be spared unpleasant and seamy stories"; as Karafiol laments, the judiciary seems to be comparatively indifferent to the "right of the individual to exclude society from his private life."[20]

The objective of this paper is threefold: to review the development of the mass communication tort of privacy, including an examination of the newsworthiness defense; to assess the relationship between privacy and community mores; and to propose a four-part test for privacy claims against the press, a standard of liability intended as a substitute for the "community's notion of decency" test.

The Mass Communication Tort of Privacy

According to the recognized authority on tort law, the recently promulgated Restatement (Second) of Torts, the mass communication tort of privacy requires that publicity be given to an individual's private life and that the disclosed private facts are both "highly offensive to a reasonable person" and of no "legitimate concern to the public."[21] Invariably, a tortious public disclosure involves mass communication because "publicity" means dissemination to the public at large, not merely publication to a third party.

If dissemination of information to the public at large typically involves mass communication, it also typically involves journalists, a species of communicator whose Constitutional freedoms the courts are especially reluctant to restrict. It is of no small consequence to the privacy plaintiff that the conflict between the right of privacy and freedom of the press manifests itself as a lopsided battle between the Constitution and the common law: while journalists and their press can turn to the First Amendment for the protection they seek, an individual seeking damages from a prying press can find little in the Bill of Rights to support a right of privacy. Privacy claims against an overbearing and too powerful government may invoke the Constitution, as the Supreme Court finally recognized in 1965 in Griswold v. Connecticut,[22] but the Court has yet to acknowledge that privacy claims against the press may require a re-evaluation of the meaning of freedom of expression. On the contrary, it is clear that the Court is not inclined to establish a broad privacy right intended to "protect certain areas of individual autonomy, identity, and intimacy from any intrusion by society at large"; whatever Constitutional legitimacy privacy may have, the judiciary is not disposed in favor of Emerson's proposal, which is to establish appropriate guidelines in an effort to "define the right of privacy and award that right full protection against claims based on freedom of the press."[23]

Fully consistent with the Supreme Court's lack of initiative in the privacy area,[24] the lower courts generally view the privacy tort as Constitutionally infirm. Typically, the courts evade the conflict between the right of privacy and freedom of the press by alluding to a broad Constitutional privilege to publish the day's news, a privilege "not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs"; as the Fifth Circuit Court of Appeals recently advised, the privilege "extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period."[25]

The Defense of Newsworthiness

In their dealings with true but embarrassing facts, journalists enjoy two common law privileges: the right to publish any information about an individual if the individual has given his or her consent, either implied or expressed; and the right to publish any information about an individual if the information is legitimately newsworthy. Ordinarily, the consent defense is of little controversy -- in part because it involves an agreement between the press and the individual about whom the press is writing, and in part because it seldom raises questions of any Constitutional significance. The newsworthiness defense, however, it as controversial as it is inadequately defined; not only is there little consensus on what "news" or "newsworthy" means,[26] but efforts to delineate the scope of the privilege inevitably compromise the First Amendment guarantee of a free press.

In its countless efforts to reconcile an individual's privacy needs with society's needs for an informed citizenry, the judiciary has neither advanced nor adopted a unified theory of news; as a matter of jurisprudence, the concept of newsworthiness "has no generally accepted meaning."[27] Moreover, in light of the Supreme Court's recent admonition that defining news or newsworthiness is

not a task best left to the "conscience of judges,"[28] it seems reasonably prudent to conclude that the common law of privacy will not soon evolve to the point where the defense of newsworthiness is as meaningful to plaintiffs as it is to the press.

In practice, the press has become the sole arbiter of its own defense: apparently "there is force to the simple contention that whatever is in the news media is by definition newsworthy."[29] In other words, since newsworthiness tends to be defined descriptively, not normatively, judges and juries must contend with a strictly empirical and hopelessly tautological view of the newsmaking process: news is whatever journalists say it is.[30] In short, since the newsworthiness defense essentially means that the dissemination of news does not constitute an actionable invasion of privacy,[31] and since the press is in the business of disseminating news, the dissemination of "private facts" as news is not an actionable invasion of privacy. While there exists a handful of cases where the courts have upheld privacy claims against the press,[32] it is significant that since Time, Inc. v. Hill in 1967,[33] when the Supreme Court applied to privacy the Constitutional fault standard used to protect the press in libel litigation, there has been no reported case "in which a plaintiff has succeeded in finally recovering damages for truthful disclosure by the press."[34] It may be no exaggeration to conclude, as Kalven did nearly two decades ago, that the privilege of newsworthiness is so "overpowering as virtually to swallow the tort."[35]

If the newsworthiness defense is not entirely an unqualified privilege, it is due only to the judiciary's willingness to consider the public disclosure of embarrassing facts as an indecency, a standard of liability commonly used by the courts in their efforts to wade through the pornography quagmire.

News, Decency, and Privacy

In one of the earliest and still one of the most influential of the

privacy cases, Sidis v. F-R Publishing Corp., the Second Circuit Court of Appeals held that the "prying of the press" deserves protection if the press confines itself to the "unembroidered dissemination of facts."[36] Under the guise of "newsworthiness," the Court was willing to protect the publication of a New Yorker article about a young man, William James Sidis, who charged that the magazine exposed him to "unwanted and undesired publicity" and, arguably, subjected him to "public scorn, ridicule, and contempt":[37] only when the public revelations are "so intimate and so unwarranted in the view of the victim's position to outrage the community's notion of decency,"[38] the Court of Appeals ruled, would privacy claims outweigh the public's interest in information.

If the Sidis Court offers only a cursory recognition of the connection between community mores and the newsworthiness defense, as Woito and McNulty suggest in their recent study of the disclosure tort, the decision of the Ninth Circuit Court of Appeals in Virgil v. Time, Inc.[39] "represents a significant advance"; for in Virgil the Court articulates "a functional test based on community mores to determine the scope of the newsworthiness privilege."[40] Specifically, the Virgil Court argues that when juries assess the meaning of newsworthiness,

> account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[41]

Thus, the functional test put forth in Virgil, a test vindicated by Woito and McNulty as "the proper focus of the privacy-free press debate,"[42] recognizes the Constitutional importance of the newsworthiness privilege but at the same time acknowledges that there must be reasonable limits to such a

privilege, at least insofar as the judiciary is committed to the preservation of the privacy tort. Accordingly, the Virgil Court rejects the proposition that the newsworthiness defense extends to all true statements; what the judiciary must avoid, the Court argued, is a privacy right "based not on rights bestowed by law but on the taste and discretion of the press."[43] To sustain the newsworthiness privilege without having to resort to a press-imposed definition of the privilege, the Virgil Court proposes a test based on an assessment of the function of the disclosure: recovery for the privacy plaintiff would depend on demonstrating that a characteristically morbid and sensational disclosure functions to offend the reader of ordinary sensibilities.

For Mike Virgil, however, the functional test worked in favor of the press. A body surfer whose "strange behavior"[44] became the subject of a Sports Illustrated article, Virgil was unable to convince a district court in California that the article was offensive "to the degree of of morbidity or sensationalism"[45] necessary for an actionable privacy claim. It is significant that the district court was unwilling to accept a motion for summary judgment before the Court of Appeal's decision in Virgil but was willing to grant the motion after the decision. It may well be, as Barron and Dienes points out, that the functional test "fails to give the privacy tort sufficient maneuver"; more importantly, there may be good reason to challenge the very wisdom of the functional test on the grounds that it "does somersaults with usual journalistic standards of newsworthiness or public interest in saying that because disclosure of certain matters is outrageous, it is therefore neither a matter of public interest nor newsworthy."[46]

Community Mores and the Right of Privacy

The decency standard introduced in Sidis and refined in Virgil[47] may be a

principled one, as Woito and McNulty contend, and it may have even "broken new substantive ground in the privacy area,"[48] but as a matter of jurisprudence it rests on the wrong principle; and as a standard of liability, the new ground it breaks will not provide a sustentative harvest for the privacy claimant. If there is indeed a relationship between community mores and the right of privacy, it arises from a community's commitment to the importance of each individual's autonomy and dignity; it is not based on a community's desire to shield itself from objectionable expression. The latter -- privacy as an aspect of decency -- is a convoluted view of privacy, a conceptualization wholly at odds with the fact that when a person's privacy is violated the "injury is peculiar to the individual, rather than shared with others."[49] Privacy is to be valued by the community, and in this sense it is legitimately a community more. But to say that privacy is a community more is not to deny what is at the center of all privacy claims: an individual's accessibility to others in the community, namely the extent to which an individual is known to others and the extent to which an individual is the subject of others' attention.[50]

While it is true that the importance of privacy is predicated on community values, it does not follow that the judiciary should employ a community decency standard to determine when an individual's privacy has been violated. It is incumbent upon the courts to establish their own criteria for determining when an individual's privacy has been violated; if morbidity or sensationalism is a relevant criterion, then the courts are obliged to demonstrate the connection between one person's privacy and another person's sensibilities.

Privacy and Pornography

It is difficult to understand Woito and McNulty's claim that the Virgil decision "stands as a long overdue concession to the plaintiff in the disclosure tort action"[51] because the decency standard advocated in Virgil

fails to establish any relationship between an individual's privacy rights and the community's need to be protected from exposure to offensive and shocking private facts. If anything, Virgil appears to be a concession to a community's desire to rid itself of morbid sensationalism for its own sake; obstacles to recovery under the mass communication tort are as onerous with Virgil's functional test as they are without it. Simply put, the Virgil standard does more to protect the community's interest in decency than the community's interest in privacy. Virgil may protect the community in the name of privacy, but to invoke privacy is not to protect it or even strengthen its standing as a civil right.

The problem with Virgil is that it confuses two very different aspects of privacy: the right to maintain some control over the public disclosure of embarrassing facts and the right to maintain some control over the public's exposure to offensive expression. Having blurred the distinction between "disclosure" and "exposure," the Virgil Court posits an inexplicable link between a community's decency and an individual's embarrassment. In what must surely be a tortured lesson in logic, Virgil recognizes privacy as a conditional right, where the requisite condition is altogether irrelevant to an individual's loss of privacy: the disclosure of embarrassing facts are an invasion of ana individual's privacy only when their exposure in public is offensive.

Woito and McNulty are certainly correct when they point out that Virgil's "functional test" is based on a "community decency standard analogous to that applied by the courts in obscenity cases,"[52] and it is true that the courts have utilized a privacy rationale in many of these decisions.[53] But what Woito and McNulty fail to appreciate is that when the courts rely on privacy as a justification for restricting offensive expression, their reference to privacy is in the context of the intrusion tort, not the public disclosure tort. In a

variety of cases, the Supreme Court has focused its attention on "intrusion by expression," a violation of privacy involving, typically, an objectionable expression and an audience held "captive" by that expression.[54] A recent example is FCC v. Pacifica Foundation,[55] where the Supreme Court upheld the authority of the Federal Communications Commission to regulate -- though not ban -- indecent broadcasts; to a large extent, the Court's decision relied on the privacy rights of the listener, a right "not to hear" offensive programming at certain times of the day.[56] Clearly, Pacifica has nothing to say about the public disclosure of embarrassing facts.

Not only is the privacy discussion in Pacifica unrelated to the privacy issue in Virgil, but on several occasions the Supreme Court has ruled that to regulate or otherwise restrict offensive but Constitutionally protected expression, it must be demonstrated that it is virtually impossible for the offended members of the community to "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[57] It follows, then, that the decency standard used in Sidis or Virgil not only confuses two very different aspects of privacy but defies the very doctrine in which it is presumably grounded: in neither Sidis nor Virgil is any effort made to (1) establish that readers of "ordinary sensibilities" comprise a "captive audience," or (2) establish that the disclosure was offensive to the degree that it deserves no Constitutional protection. Decidedly, without arguing that readers are held captive by the disclosure or that the disclosure itself qualifies as an obscenity, Virgil's "functional test" appears to be at odds with the history of the Supreme Court's struggle to define and confine pornography.

Privacy, Dignity, and Democracy

Virgil's failure to properly distinguish between various types of privacy is but one of many unfortunate illustrations of what Gavison describes as the "confusions that will inevitably arise if care is not taken to follow an

orderly conceptual scheme."[58] To the extent that the Virgil Court and others have relied on Prosser's four torts as a basis for understanding the sense and scope of privacy, it is unsurprising that, as Emerson recently observed, the "theoretical foundations of the right of privacy are relatively unformed."[59] Conceptually, Prosser's effort to compartmentalize privacy does not include a compelling argument for the recognition of four distinct privacy rights; and in practice, the application of Prosser's typology does not result in the kind of discernable pattern from which a coherent theory or theories of privacy might emerge. In the final analysis, Prosser's treatment of privacy fails to aid judges because it fails to treat privacy as a value worthy of its own status.

As a distinct value, privacy is not a question of decency in the community, as Virgil would have us believe, but a matter of human dignity; it is, precisely, a commitment to the need to maintain an individual's individuality. In his thoughtful and articulate proposal for a general theory of individual privacy, Edward Bloustein identifies the goal of privacy as the riddance of human fungibility:

> The man who is compelled to live every minute of his life with others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.[60]

From Bloustein's perspective, an invasion of privacy is an affront to dignity; it "threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does."[61]

To violate an individual's privacy not only jeopardizes an individual's

dignity but, more broadly, undermines the existence of a democratic society. Following Gavison, for whom privacy is, in part, an aspect of political freedom, what is distinctive about individuals is what is distinctive about pluralistic, tolerant societies. Since privacy fosters moral autonomy, which is essential if individuals are expected to form judgments and express preferences, privacy is a necessary condition for self-government. Moreover, privacy functions to insulate political discussions and associations and thus serves to enhance each individual's opportunity to negotiate positions and policies. Finally, a respect for privacy may insure greater participation in public life, especially if public officials are not deprived entirely of their private lives.[62]

In sum, privacy is an essential value in terms of both the role it plays in preserving the autonomy of the individual and the role it plays in the maintenance of a democratic society.

Privacy and the Press: Toward an Accommodation

To advocate a right of privacy is not to belittle such countervailing interests as a free and unintimidated press. But as important as freedom of expression is to individuals and the community in which they live, it would indeed be a dire conclusion to suggest that the First Amendment precludes any attempt to control an intrusive press. Of course, to effectively protect an individual from an invasion of privacy by the press would require prior restraint; it is, in fact, the "only remedy that would not expand the injury originally caused by the invasion of privacy."[63] Prior restraint, however, must be disfavored because it "is so easy to apply and so destructive in its impact upon freedom of the press."[64]

Although victims of lurid journalism should have the right to recover damages, the goal of privacy law must be to prevent its further abuse. To this

end, it is important to enhance and strengthen the law of privacy if only because "a commitment to privacy as a legal value may help to raise awareness of its importance and thus deter reckless invasions."[65] Or as Bloustein puts it, an invasion of privacy is an injury "to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus treatened rather than a recompense for the loss suffered."[66] Thus to "control" an intrusive press represents an interest in accountability rather than an interest in the suppression of expression.

The difficulty in assessing a loss of privacy remains one of the major obstacles to the further development of privacy law. Since an individual's dignity is more incorporeal than tangible, and since "the law's vocabulary of mind is exceedingly limited,"[67] establishing the importance of privacy may not be nearly as challenging as establishing the criteria for a prima facie case. It is a sad commertary on the state of privacy law that the compensable injury is usually "emotional distress"; as a rule, privacy itself is "not viewed as something of value that can be injured or destroyed."[68]

To establish the grounds for an actionable privacy claim against the press, it is important to distinguish between the plaintiff's responsibilities and the responsibilities of the defendant. If the plaintiff accepts responsibility for demonstrating that the disclosed facts were both private and tortious, then the defendant has the burden of responsibility for showing that the private facts were legitimately newsworthy and that the identification of the plaintiff was an essential aspect of the news story. Thus what emerges as a reasonably comprehensive effort to protect both parties in privacy litigation is a four-part test, where a successful claim against the press requires not only a successful showing by the plaintiff but a failure of the defendant to meet the criteria of the newsworthiness privilege.

The Plaintiff's Burden

The plaintiff's burden of responsibility involves showing that the disclosed facts are truly private. A useful criterion for determining the privacy of facts is what Emerson calls "the element of intimacy"; a private fact is one "related to the intimate details of a person's life: those activities, ideas or emotions which one does not share with others or shares only with those who are closest."[69] Having demonstrated the privacy of the disclosed facts, the plaintiff would then need to establish that their publication was sufficiently embarrassing to result in -- or bring about -- a loss of dignity.

Establishing the privacy of a fact is a straightforward empirical question; the court can rely heavily on testimony from friends and members of the plaintiff's family. The plaintiff's lifestyle or position in the community might be relevant considerations. Obviously, what constitutes a "private fact" is a determination based on an understanding of what each person regards as his or her "zone of privacy."

If the privacy of facts will not prove to be a difficult determination, establishing the harm caused by their publication involves an intricate assessment of the plaintiff's sense of self. Probably through expert testimony, the court needs to be convinced that the plaintiff not only resents the disclosure in the sense that the disclosure was embarrassing but that the degree of embarrassment was such that the plaintiff's freedom to function autonomously has been impaired. Specifically, it needs to be established that the plaintiff is keenly aware of an undesired and unauthorized public awareness of the plaintiff's private life; and as a consequence of the plaintiff's perceptions of this public awareness, the plaintiff is inhibited in ways detrimental to his or her wellbeing.

Admittedly, establishing a loss of dignity is a difficult and complicated task, although probably no more difficult or complicated than any of the other

"states of mind" with which the judiciary must regularly contend. And it is certainly no more or less appropriate for the courts to assess loss of dignity as it is to assess mental anguish.

The Defendant's Burden

The newsworthiness privilege properly protects the press when the press serves to inform and enlighten its readers. But the courts are not compelled to accept all press content as privileged. Indeed, rather than assuming that all editorial content is, ipso facto, news and therefore subject to the newsworthiness defense, the press should be called on to demonstrate that its disclosure of private facts was truly in the public interest, not merely of public interest. That is, rather than having the plaintiff negate the newsworthiness of the disclosure, which is presently the common law tradition,[70] the press should be expected to explain why its disclosure is appropriately "in the public interest" and thus privileged.

If the disclosed private facts deserve protection under the newsworthiness privilege, it does not necessarily follow that the publication of the plaintiff's identity also warrants protection. Here the courts need to determine the relative importance of the plaintiff's name or identity to the intelligibility or meaningfulness of the private facts. To borrow Bezanson's distinction between the impact value and the communicative value of the disclosure,[71] it would be appropriate for the courts to decide whether the identification of the plaintiff "deepens and enhances understanding and perspective" (its communicative value) or whether it "narrow's the reader's perspective" by distracting the reader from the substantive functions of the news story (its impact value).

Thus the courts should be expected to rule on the newsworthiness privilege as it might be applied to both the public disclosure of embarrassing facts and the public disclosure of the plaintiff's identity. An affirmative finding on

the former should have no bearing on the courts' determination of the latter.

1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, 4 (December 1980): 196.
2. William Prosser, quoted in Harry Kalven, Jr., "Privacy in Tort Law -- Were Warren and Brandeis Wrong?" Law and Contemporary Problems, 31 (Spring 1966): 326.
3. For a review of statutory protection of privacy, see Peter L. Felcher and Edward L. Rubin, "Privacy, Publicity, and the Portrayal of Real People by the Media," Yale Law Journal, 88 (July 1969): 1581-1584.
4. Statutory protection of privacy in New York was established in 1903 and differs from the common law in that it defines privacy only in the context of publishing a person's name or likeness for "advertising" or "purposes of trade." See N.Y. Civil Rights Law, Sections 50-52 (McKinney 1976). See also Felcher and Rubin, p. 1582.
5. New York Times v. Sullivan, 376 U.S. 254, 270 (1954).
6. Warren and Brandeis, p. 195.
7. The idea of a "right to be let alone" was introduced in 1888 by Judge T. Cooley but was popularized by Warren and Brandeis in their 1890 Harvard Law Review article.
8. William Prosser, "Privacy," California Law Review, 48 (1960): 389.
9. See for example Dietemann v. Time, Inc., 449 F.2d 244 (9th Cir. 1971).
10. See for example Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
11. See for example Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).
12. See for example Time, Inc. v. Hill, 385 U.S. 374 (1967).
13. See Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University Law Review, 39 (December 1964): 962-1007. Reprinted in Individual and Group Privacy. New Brunswick, N.J.: Transaction, 1978, pp. 1-46.

14. Ruth Gavison, "Privacy and the Limits of Law," Yale Law Journal, 89 (January 1980): 460.
15. Gavison, pp. 460-461.
16. Gavison, pp. 466-467.
17. See for example Dorsey D. Ellis, Jr., "Damages and the Privacy Tort: Sketching a 'Legal Profile'," Iowa Law Review, 64 (July 1979): 1111-1154.
18. Kalven, p. 333.
19. Sidis, 113 F.2d at 808.
20. Emile Karafiol, "The Right to Privacy and the Sidis Case," Georgia Law Review, 12 (Spring 1978): 525.
21. Restatement (Second) of Torts, section 652D (1977).
22. 381 U.S. 479 (1965).
23. Thomas I. Emerson, "The Right of Privacy and Freedom of the Press," Harvard Civil Rights - Civil Liberties Law Review, 14 (Summer 1979): 341-342.
24. The Supreme Court has heard only three privacy cases, none of them involving the public disclosure tort. See Time, Inc. v. Hill, 385 U.S. 374 (1967); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
25. Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).
26. For a recent examination of the newsworthiness privilege, see Theodore L. Glasser, "Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense," Communications and the Law, 4 (Spring 1982): 23-42. See also Don R. Pember, "Privacy and the Press: The Defense of Newsworthiness," Journalism Quarterly, 45 (Spring 1968): 14-24; and Comment, "The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness," University of Chicago Law Review, 30 (Summer 1963): 722-734.

27. Thomas I. Emerson, The System of Freedom of Expression. New York: Random House, 1970, p. 533.
28. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).
29. Kalven, p. 336.
30. Glasser, p. 25.
31. See for example Bremmer v. Journal-Tribune Publishing Co., 76 N.W. 2d 762 (1956).
32. See Barber v. Time, Inc., 159 S.W. 2d 291 (1942); Daily Times Democrat v. Graham, 162 So. 2d 474 (1964); and Melvin v. Reid, 297 P. 91 (1931).
33. 385 U.S. 374 (1967).
34. Ellis, p. 1133, n. 163.
35. Kalven, p. 336.
36. Sidis, 113 F.2d at 808.
37. Sidis v. F-R Publishing Corp., 34 F.Supp. 19,20 (S.D.N.Y. 1938).
38. Sidis, 113 F.2nd at 808.
39. 527 F.2d 1122 (9th Cir. 1975).
40. Linda N. Woito and Patrick McNulty, "The Privacy Tort and the First Amendment: Should the Community Decide Newsworthiness? Iowa Law Review, 64 (January 1979): 217.
41. 527 F.2d at 1129 (footnotes omitted).
42. Woito and McNulty, p. 217.
43. 527 F.2d at 1123.
44. Virgil's "strange behavior" included eating spiders, biting off the cheek of a man, and extinguishing a lighted cigarette in his mouth.
45. Virgil v. Sports Illustrated, 424 F. Supp. 1286 (S.D. Cal. 1976).
46. Jerome A. Barron and C. Thomas Dienes, Handbook of Free Speech and Free Press. Boston: Little, Brown and Company, 1979, p. 395.

47. See Hill, "Defamation and Privacy Under the First Amendment, Columbia Law Review, 76 (1976): 1205-1262, who argues that the roots of Virgil's "unconscionability" standard is in Sidis.
48. Woito and McNulty, p. 231.
49. Emerson, The System of Freedom of Expression, p. 517.
50. See Gavison, p. 423.
51. Woito and McNulty, p. 221.
52. Woito and McNulty, p. 187.
53. See for example Stanley v. Georgia, 394 U.S. 557 (1969).
54. See Cohen v. California, 403 U.S. 15 (1971); compare with Kovacs v. Cooper, 336 U.S. 77 (1949).
55. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
56. For a discussion Pacifica and the listener's privacy rights, see Theodore L. Glasser and Harvey Jassem, "Indecent Broadcasts and the Listener's Right of Privacy," Journal of Broadcasting, 24 (Summer 1980): 285-299.
57. Cohen v. California, 403 U.S. 15,21 (1971); see also Consolidated Edison v. Public Service Commmission, 100 S.Ct. 2326, 2335 (1980).
58. Gavison, p. 440.
59. Emerson, "The Right of Privacy and Freedom of the Press," p. 330.
60. Bloustein, p. 42.
61. Bloustein, p. 41.
62. See Gavison, pp. 455-466.
63. Emerson, "The Right of Privacy and Freedom of the Press," p. 348.
64. Emerson, p. 349.
65. Gavison, p. 471.
66. Bloustein, p. 42.
67. Bloustein, p. 41.
68. Ellis, p. 1150.
69. Emerson, p. 343.

70. See for example Howard v. Des Moines Register & Tribune Co., 283 N.W. 2d 289 (Iowa S.Ct. 1979).

71. Randall P. Bezanson, "Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press," Iowa Law Review, 64 (July 1979): 1061-1109.